Chapter One

INTRODUCTION: EVERY STATE A WELFARE STATE

THIS BOOK examines the constitutional dimensions of the welfare debate in America. The precise shape of state-facilitated welfare here and elsewhere will depend on results of policy experiments either under way or anticipated and on the contest among philosophic frameworks for describing those results. Because I share to some limited extent the conventional view that constitutional questions differ from policy questions, this book proposes few specific policies in the Constitution's name. But I shall emphasize here what I have argued elsewhere: the American Constitution makes sense (and originally made sense) only in light of general substantive ends like national security, freedom of conscience, domestic tranquility, and the people's economic well-being. For this reason, fidelity to the American Constitution entails a concern for more than negative constitutional rights, constitutional procedures, and institutional forms; it also entails a concern for what James Madison called "the solid happiness of the people." And this must be the chief concern—the end to which all other concerns must bend. As Madison reminded critics who saw the ratification debate as a contest between confederated and unitary or "consolidated" forms of government, the American Revolution teaches that "the real welfare of the great body of the people is the supreme object to be pursued; and . . . no form of Government whatever, has any other value, than as it may be fitted for the attainment of this object."[1]

I try here to defend Madison's statement about the end of government and to show what it imports for the basic normative nature of the American Constitution, for the cultivation and maintenance of a people that appreciates such a constitution as its own, and for constitutional theory as a field of academic inquiry. I try to persuade constitutional theorists to take the Constitution's Preamble seriously and turn to the hard philosophic and scientific work of formulating a forthrightly substantive theory of "the general Welfare." I contend against

[1] Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961), No. 45, p. 309. Subsequent references to *The Federalist* will take the following form: (paper number: page number of Cooke's edition).

scholars who argue on multiple philosophic grounds against the possibility of such a theory. I show that the Constitution itself presupposes such a theory and implies guidelines for developing it. I derive these guidelines from the constitutional text and then use them to formulate a working theory of the general welfare, which theory I submit to the debate about the substance of the nation's values and character. According to this working theory, the Constitution not only permits but under some social conditions can even require such benefits as Social Security pensions for the aged and disabled, Medicaid for the poor, the late Aid to Families with Dependent Children (AFDC), and, above all, a liberal or self-critically secular education at public expense for the children of all who want it.

I also argue that because enforcing many such state duties falls more to the taxpaying electorate than to the judiciary, declining public sympathy for the poor (and other developments, like religious-based hostility to the public schools as fonts of secular reasonableness) indicates that the authors of *The Federalist* erred in thinking they could maintain the Constitution by relying mostly, if not exclusively, on what they called "the private interest of every individual" to be "a centinel over the public rights" (51:349). They erred in thinking they could avoid active governmental efforts to foster a citizenry whose members were at once personally responsible and public-spirited. By book's end I hope to persuade the reader that the debate over welfare for the poor is really a debate about constitutional and even cultural reform, a debate about the meaning of "responsibility" and the character and true well-being not just of the poor but of the nation as a cultural whole.

Following my discussion later in this introductory chapter about matters of terminology and argumentative strategy, my first step is to describe the basic normative properties of the American Constitution as a legal document. I contend in chapter 2 that the Constitution is more a charter of positive benefits—a positive or welfarist constitution, if you will—than a charter of negative liberties and that a central question for constitutional theory is not *whether* state-facilitated welfare but *what* state-facilitated welfare and *for whom*. Answering this question involves issues with philosophic and scientific dimensions, like the best conceptions of personal and national well-being both in theory and reasonably within the nation's aspirations. This book would persuade constitutional theorists to do what they can to help answer this complex of questions and to publicize its importance for the social sciences and the humanities generally. But no such commitment of resources is likely where constitutional theorists are either persuaded or simply assume that constitutional guarantees are limited by and large to what courts can enforce and thus to the definition of citizenship and

participatory rights, the horizontal and vertical arrangements of governmental offices and powers, procedural protections for persons accused of crime, the right to equal concern and respect for some minorities, and a handful of substantive rights understood as "negative liberties" or qualified exemptions from governmental power.

This list of the Constitution's normative functions is conventional wisdom among today's constitutional theorists. The list was less modest in times past. Today's view of constitutional functions not only fails to reflect the constitutionalism of the Progressive Era and the New Deal; it fails also to comprehend Jefferson's proposition, asserted to be "self-evident" in the Declaration of Independence, that legitimate governments are established by people "to effect their Safety and Happiness." The current view falls short of Madison's commitment to the people's welfare because promoting the people's welfare entails affirmative governmental duties and corresponding rights. The current view excludes any right in the people to what Lincoln called a "government whose leading object is to elevate the condition of men."[2] Far short of grand ends like the people's welfare and happiness, the current view excludes even a constitutional right to police protection against third-party or "private" violence, and this notwithstanding the Constitution's situation in a philosophic tradition that puts protection from private violence "at the heart of the social contract."[3] The dominant view at present is that affirmative rights—even to police protection—are alien both to the constitutional text and to a constitutional tradition dominated by free-market ideology. Talk of affirmative substantive rights is supposed to undermine negative rights like the freedoms of speech and religion and blur the distinction between totalitarian and free-world constitutions. And the question of "what welfare and for whom" is supposed to confront insuperable metaphysical and epistemological objections to any hope for objective answers. In chapters 2 through 4, I try to meet these historical, philosophic, and policy objections to the positive turn that this book proposes for constitutional theory.

Chapters 2 through 4 do work that is largely negative; they criticize conventional thinking in hopes of reversing the present presumption against a welfarist view of the Constitution. Chapter 5 is the positive heart of the book; it sets forth a substantive theory of the general wel-

[2] Abraham Lincoln, "Message to Congress: July 4, 1861," in Roy P. Basler, ed., *Abraham Lincoln: His Speeches and Writings* (New York: Grosset and Dunlap, 1946), 607.

[3] See Robin West, "Rights, Capabilities and the Good Society," *Fordham Law Review* 69 (2001): 1908–9, 1922–23; see also Steven J. Heyman, "The First Duty of Government: Protection, Liberty and the Fourteenth Amendment," *Duke Law Journal* 41 (1991): 508, 530–45.

fare and submits it to constitutional theory as a field of academic inquiry that should be open to such submissions. In keeping with my understanding of the general welfare—its nature and the normative gap between (presumably) real goods like the general welfare and our theories of these goods—I submit my theory as a working hypothesis for the substantive debate about the nation's values, a debate to which constitutional theorists can make special contributions. Chapter 5 begins by sketching some formal principles of the Constitution as a charter of positive benefits; the aim is to show how these formal principles can influence theories of the people's well-being, the corresponding duties of officials, and the power of constitutional government to shape the attitudes of its people. The chapter then sketches what can be described as a theory of the general welfare that is social-democratic in substance yet largely "conservative" or at least "traditional" in derivation and "perfectionist" in execution. Deploying arguments from my previous works, present-day progressive writers, neo-Aristotelians, and American classics like *The Federalist* and the speeches of Lincoln, the chapter proposes that the Constitution promises a government that is actively concerned with substantive goods like children who are healthy and educated to think for themselves on the basis of evidence available in principle to humankind in general, as opposed to this or that religious, sexual, or racial perspective. The chapter also proposes that constitutional government in America can legitimately foster personal responsibility, and that for the same reason that it can foster personal responsibility it can legitimately discourage racism, forms of religious zeal, and a self-indulgence that breed indifference and blindness to public purposes, hostility to the ends of a liberal regime, and an incapacity to act on reasons that anonymous, competent, and autonomous persons can recognize as good reasons.

The book's final chapter exposes my pessimism about the shape of things to come in America and reflects my belief that the Constitution is imperfect, even by its own standards. Fidelity to the Constitution hardly precludes this belief,[4] for the ratification provisions of Article VII and the amending provisions of Article V combine to imply at least the possibility of constitutional inadequacy. We are thus entitled to ask whether the government established to promote the general welfare can do much to redeem that promise. This question is largely beyond the scope of this book. Whether and under what conditions the nation's public philosophy is ever likely to shift in a positive direction are questions *for* constitutional theory but not *of* constitutional theory;

[4] See J. M. Balkin, "Agreements with Hell and Other Objects of Our Faith," *Fordham Law Review* 65 (1997): 1703–38.

they can be answered, if at all, only by the social sciences. Whether the national government has the requisite competence as a matter of current legal doctrine is also a question *for* but not *of* constitutional theory, for the focus of constitutional theory, I have contended elsewhere and assume here, should be the *Constitution*, not the opinions of some fallible body of interpreters. For these reasons my contribution to the question of constitutional adequacy is mostly a prolegomenon to the question, or to the formal part of the question. I find the pivotal issue to be that which divided Hamilton and Madison over the meaning of the general welfare clause of Article I: how Congress's power to tax and spend for the general welfare is related to the substantive powers (over commerce, the military, etc.) enumerated in Article I, section 8. I show how the principles of the Constitution as a charter of benefits should influence the outcome of that debate. I also address a question that I show to be one of less importance: how the charter of benefits should influence the judicial definition of "welfare rights" under the Fourteenth Amendment.

In the rest of this introductory chapter I describe the general view of the Constitution against which this book contends. I also take up matters of terminology and strategy that bear heavily on my views regarding what well-being in America consists in and the state's duty to promote it.

The Negative-Liberties Model of the Constitution

Present-day students of the Constitution seem generally to assume that, for better or worse, the Constitution leaves government's provision of goods and services, from national defense to pensions and schools, to the play of pluralist political forces represented by elected officials whose decisions are legally restricted solely by judicially declared fundamental rights and structural principles. Thus conceived, the Constitution is a "charter of negative liberties": it guarantees exemptions *from* governmental action, not rights *to* governmental benefits. It imposes no unconditional *duty* to provide, and therefore it guarantees no *right* to any substantive benefit beyond access to the system of interest representation.[5] Whether the Constitution *permits* a specific benefit is held to depend on whether the appropriate level of govern-

[5] See, e.g., *Jackson v. City of Joliet*, 715 F. 2d 1200 (7th Cir. 1983); *DeShaney v. Winnebago*, 489 U.S. 189 (1989); David P. Currie, "Positive and Negative Constitutional Rights," *University of Chicago Law Review* 53 (1986): 864, at 864–67; Terrance Sandalow, "Social Justice and Fundamental Law," *Northwestern University Law Review* 88 (1993): 461, at 464–65.

ment (federal or state) delivers the benefit in a legally authorized way and whether the delivery affects rights the judiciary is obligated to protect, like the claimed liberty of business to contract for labor at whatever price workers will accept or the claimed right of just compensation at public expense when land-use regulations diminish the market value of real estate.

This negative-liberties model of the Constitution organizes much of the debate regarding state-facilitated welfare in America. It excludes any proposal that constitutional theorists find a workable theory of the general welfare as an end that government is constitutionally obligated to pursue. Not that the negative-liberties model is *the* obstacle to what this book proposes; I doubt that constitutional theory generally has much beyond a limited influence on political practice. The negative-liberties model itself may be little more than emblematic of broader cultural forces that constitute the real obstacle to what is here proposed. These forces are strong enough to sustain the negative-liberties model in academic venues despite what will quickly prove to be its indefensible, if not fraudulent, character. These same forces also weaken the capacity of jurists, politicians, and ordinary citizens to see the Constitution for what it expressly (in the Preamble) claims to be: an instrument of goods like "the general Welfare." They therefore diminish hopes that a morally and descriptively truer model will have much of a political impact. Still, if there is a better model, it deserves explication and defense; truth attracts whether it will out politically or not. In addition, it should be hard for American constitutionalists, of all people, to concede that better ideas will probably have utterly no political consequences, and it should be no easier for academics to concede that superior theories have little hope in the academy. Also, as we shall see, the cultural forces arrayed against a better model may themselves be influenced by the Constitution, and the very power of these cultural forces undermines a family of (false) arguments against a better model: that constitutionalizing the least deniable of governmental benefits (like police protection) puts us on a slippery slope to totalitarian socialism.

While the role of the negative-liberties model in arguments against welfare provision is evident enough, the model gets implicit tribute even from most constitutional arguments *for* state-facilitated welfare. Constitutional arguments for state-facilitated welfare can be classified broadly as either welfare-as-derivative or welfare-as-fundamental, with the derivative view being the most popular by far. The derivative view defends rights to subsistence, employment, education, and the like as the contingent demands of a right to equal concern and respect and the prerequisites to the meaningful exercise of rights like speech

and voting and thus to democratic citizenship generally.[6] These arguments for welfare parallel arguments that the welfare state functions as an adjunct of the market by maintaining the market, enabling participation in it, and compensating for its failures.[7] These arguments suggest the negative-liberties model. By treating welfare rights as mere derivatives of structures and exemptions from power, they suggest that exemptions and structures enjoy primacy over constitutional benefits or substantive ends. These arguments do not suggest, as other arguments do,[8] and as I shall press here to the fullest extent, that substantive benefits far beyond police protection are ends to be numbered among a constitutional government's first responsibilities.

Yet arguments for welfare rights as derivative rights remain persuasive and, for some purposes, unavoidable. I resort to a derivative strategy myself when I offer a substantive theory of the general welfare that meets what chapter 5 shows to be a two-part constitutional test of simple ethical attractiveness and cultural appropriateness—an American version of the general welfare that can claim with some plausibility to be more than merely American. But I employ a different strategy when explicating the Constitution's basic normative nature. I explain why in the next section, and in the process I clarify the aims of this

[6] See, e.g., Akhil Reed Amar, "Forty Acres and a Mule: A Republican Theory of Minimal Entitlements," *Harvard Journal of Law and Public Policy* 13 (1989): 42–43. See also Frank I. Michelman, "Welfare Rights in a Constitutional Democracy," *Washington University Law Quarterly* (1979): 674–79; Peter B. Edelman, "The Next Century of Our Constitution: Rethinking Our Duty to the Poor," *Hastings Law Journal* 39 (1987): 1, 19–23; Kenneth L. Karst, "Foreword: Equal Citizenship under the Fourteenth Amendment," *Harvard Law Review* 91 (1977): 1, 62; Mark A. Graber, "The Clintonification of American Law: Abortion, Welfare, and Constitutional Theory," *Ohio State Law Journal* 58 (1997): 731, 747, 753–54 (but cf. writers cited with approval at 752).

[7] See, e.g., Robert E. Goodin, "Reasons for Welfare: Economic, Sociological and Political—but Ultimately Moral," in J. Donald Moon, ed., *Responsibility, Rights and Welfare: The Theory of the Welfare State* (Boulder, Colo.: Westview Press, 1988), 29–38.

[8] See, e.g., Susan Bandes, "The Negative Constitution: A Critique," *Michigan Law Review* 88 (1990): 2344–47; Charles L. Black Jr., "Further Reflections on the Constitutional Justice of Livelihood," *Columbia Law Review* (1986): 1105–7, 1113–14; Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), chap. 8; Stephen Holmes and Cass R. Sunstein, *The Cost of Rights* (New York: Norton, 1999) 87–94; Frank I. Michelman, "Foreword: On Protecting the Poor through the Fourteenth Amendment," *Harvard Law Review* 83 (1969): 9, 13–15; Lawrence G. Sager, "Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law," *Northwestern University Law Review* 88 (1993): 411–15; Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993), 69–71; Charles A. Reich, "The New Property," *Yale Law Journal* 73 (1964): 733, 786–87; Heyman, "The First Duty of Government," 507; Robert P. George, "Justice, Legitimacy, and Allegiance," in Sotirios A. Barber and Robert P. George, eds., *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton, N.J.: Princeton University Press, 2001), 321.

book, preview some of its main arguments, and defend the use of "welfare provision" and related terms to embrace all that government might do to promote the well-being of its people.

Every State a Welfare State?

In an oft-quoted statement Michael Walzer once proposed that the fundamental duty of any government is to benefit its people. Because every political community claims to provide "for the needs of its members," said Walzer, "every political community is in principle a 'welfare state.'" By the "welfare" for which the state provides, Walzer referred to all state provisions both for the general public and for particular segments of the population; these provisions include but range far beyond benefits designed for the poor.[9]

While not necessarily disagreeing with Walzer's point, most writers apply the term "welfare state" solely to a restricted set of policies and institutions for correcting failures of the market to supply broadly needed goods and, principally, according to Robert Goodin, to safeguard preconditions of the market. Examples of state provision corrective of market failure are mandatory state plans for health insurance and old-age pensions that would fail if the healthy, the young, and the affluent were free to opt out for private plans. Preconditions of the market might include an educated workforce and actors whose relative economic independence of each other (if not the state) enables them to buy and sell at prices that preserve some sense that they are doing what they want to do, not what they have to do, as where the law prohibits involuntary servitude and where an AFDC check, a Medicaid payment, or a public-works job might free a person from acquiescing in the employment offer of a local sweatshop or a neighborhood pimp.[10]

This restrictive sense of "welfare" and "welfare state" has an advantage for defenders of state provision for the poor. When he argues for "welfare" on the ground that it can help to maintain the market, Goodin implies the normative priority of the market. This puts him on common ground with "advocates of the market" from which he can show "that their own principles go a long way toward committing them to at least a minimalist welfare state," leaving "marketeers willing to resist the argument for the welfare state . . . with utterly unpalatable op-

[9] Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), 68, 64–69.

[10] J. Donald Moon, "Introduction: Responsibility, Rights, and Welfare," in Moon, *Responsibility, Rights, and Welfare*, 2–3; Goodin, "Reasons for Welfare," 24, 27–28, 29–38.

tions at every turn" (42–43). Goodin himself holds that some reasons for the welfare state are "entirely outside" market principles. An example is the respect for human dignity that he says constitutes "[t]he only reason" to respect the free choices that "the market ethos commands." But Goodin doubts that nonmarket principles alone can justify the welfare state, and he offers his market-based argument as supplementary to nonmarket arguments (31, 42).

Market- and citizenship-based arguments for welfare provision treat certain levels of well-being as preconditions of participation in the polity or the market and the provision of corresponding benefits as derivative duties of government. These arguments differ from pure welfarist arguments, those that treat the general welfare as a fundamental obligation of government. Welfarist and nonwelfarist arguments can supplement each other when justifying specific benefits deemed necessary both for human functioning and for productive membership in market or democratic societies.[11] But their differences make these strategies competitive for theoretical and long-range practical purposes. As I shall show in the course of this book, these differences imply different conceptions of citizen virtue (responsibility for self only versus responsibility also for and to others); the state's relationship to the market (as either superior or subordinate); different theories of institutional responsibilities (one favoring legislatures, the other favoring courts); and different theories of constitutional maintenance (one emphasizing education for public-spirited citizenship, the other relying chiefly on "checks and balances").

If, as Walzer says, every political community claims to provide for the needs of its members, the same holds for states that entrust the public's well-being chiefly to the market. These market-facilitating states therefore implicitly make the contingent claim that the people's welfare is best served by relying chiefly on the market. This proposition assumes that the market is mere means to the general welfare as end—and that, therefore, the public's well-being is normative *for* the market, as it is for the state, and for its members in their capacity as citizens. Thus Goodin can say: "The market and the welfare state officially aim at the same end—promoting public welfare. Morally as well as economically, the fundamental justification of the market is simply

[11] There is no intent here to deny the usefulness of the derivative arguments. Chapter 5 of this book offers a *specific conception* of the general welfare as partly derivative of the Constitution. Such a conception will, in moral-realist fashion, be distinguished from the general concept or idea of the general welfare, or *the general welfare itself*. The latter will remain normative for the former, thus preserving what common sense affirms: the possibility of error in any concrete judgment of what actually benefits a community and its members.

that under certain, tightly specified conditions, the operations of the market will serve to maximize social welfare. That is the central tenet of modern economics, first formulated by Adam Smith."[12]

Yet viewing state and market as means to the same end is not an innocuous step; modern followers of Smith may well resist it. Norman Barry is an example. Barry is a leading student of the welfare debate and generally a critic of what he calls the modern welfare state. At one point he contrasts two "line[s] of liberal welfare thinking," one proceeding from Bentham and the other, he says contrary to Goodin, from Smith. The Benthamite tradition "depends on *knowledge*" of the sort claimed or sought by "a centralized legislator" who is prepared to "evaluate various collective 'end states'—configurations of wealth, income, well-being, and so on—in terms of their measurable welfare enhancing properties" and "to reform, intervene and correct the failings of the market" accordingly. Barry opposes such thinking. He sees "an ineradicable . . . *subjectivism* in all decisions about welfare," and he says that this subjectivism makes advance knowledge of what conduces to well-being impossible. So, for Barry, the market cannot be answerable to some conception of the general welfare, nor can some substantive theory of the general welfare justify state-initiated market reform. Barry says that despite "the use of such phrases as 'the public interest,' the rationale of the market is not that it produces any such 'knowable' outcome or final state, but that it co-ordinates human action and provides that minimal level of predictability which individuals need to secure their own well-being."[13]

The obvious response to Barry is that he assumes knowledge of the very sort he tries to deny. In effect, he conceives well-being as the individual's (sense of?) possessing the capacity and the opportunity to pursue wants that the market and market society can either supply or tolerate. And since the market is a set of socially situated practices, the wants that it either satisfies or tolerates must be perceived by anonymous others as either reasonable or harmless. I argue later that this view of well-being is inevitably a bourgeois view and thus a contentious one. Barry assumes its validity despite his vaunted moral subjectivism about the nature of well-being. Not surprisingly, therefore, he eventually puts his subjectivism aside. Later he notes with approval Hayek's conception of a welfare-enhancing policy not as one that accepts whatever the market brings but as one that increases the chances of what is silently assumed to be an objective good: higher incomes of

[12] Goodin, "Reasons for Welfare," 24.

[13] Norman Barry, *Welfare* (Minneapolis: University of Minnesota Press, 1990), 24–25, his emphasis.

persons taken at random (58–59). With this Barry concedes that "some collectivist criterion of welfare seems unavoidable even in the most individualistic of doctrines" (59). He quotes with approval Amartya Sen's view that it is hard to divorce the value of the market from the value of its results, and he asserts that compared with other systems the "liberal market economy . . . has enhanced welfare" in the economic sense (ibid.). Barry thus assumes in spite of himself that some valid view of the general welfare is possible in advance of the market's results *and* that the market is answerable to that view.

I defend a strong version of this assumption in chapter 2. There I argue that the general welfare cannot be normative for any entity—market, state, or citizenry—where the general welfare is conceived solely as whatever the market's allocation turns out to be, or however some philosophic or political authority (state or citizenry) happens to define it, or as enabling whatever some political or philosophic authority conceives as effective citizenship. By some accounts citizenship may consist in no more than the bare right to vote and be counted equally with all others. Yet no one can argue that honoring this right is sufficient to transport the involuntarily homeless to a state of economic well-being. Honoring participatory rights of equal citizenship may be a step in the right direction and the only obligation of some hypothetical community. But such a community (if we could imagine it) would have little commitment to the welfare of its members. Defenders of the market state and the market society cannot help claiming, if only implicitly, that these entities constitute communities that provide for many of the important needs of their members. These claims may be held dogmatically, but they remain mere claims; people making them cannot help assuming they can prove to be false. And this assumption implies that no agent of its client's welfare can perform its duties simply by stipulating what shall count as the client's well-being. Thus the state, even a democratic state, can be wrong about what constitutes the welfare of its people.

When the implicit claim of a community to serve the well-being of its members does prove to be false, the appropriate remedy is less a matter of theory than of practical wisdom; it depends on contingencies like what parts of the claim are false, what moral or scientific facts make them false, what parts of the community care, what they are prepared to do, and what they are able to do. When markets fail, or to the extent and in the respects that market failure proves chronic, the least that can be said is that market principles cease to be normative for civic communities established to serve the needs of their members, and these communities have a reason to compensate for the market's failure. The community's refusal to vindicate its claims constitutes a rea-

son for political reform. And, in a democracy, members of the community who are materially harmed or otherwise troubled by the state's failure can take this as a failure of the general population and therewith as reason for criticism and reform of cultural proportions. The duties and aspirations of communities committed to the general welfare are defined neither by opinion (either authoritative or authentically popular) nor by some model of political or economic participation. They are defined by the general welfare itself or, in practice, by what the best self-critical and reflective effort of a people continually reveals to them about their true needs and the morally and instrumentally best ways to pursue them.

Efforts of this sort can adduce evidence that favors the market, but because this can happen only under some conditions and in some respects, the welfare state—that is, the political community that acts on its claim to provide for the needs of its members—is not an adjunct of the market. It is rather the market that is an adjunct of the political community, just as the (constitutional) state is an instrument of its ends. These controversial propositions flow from a general conception of the people's well-being as a fundamental end of popularly constituted government; they are elaborated and defended in this book. Before the main arguments begin, however, I'll comment on several objections to the capacious sense of welfare in Walzer's statement that every state is in principle a welfare state.

"Welfare": How Capacious the Term?

Some readers will object to a broad sense of the term "welfare." They will agree with Barry that a broad sense of "welfare" departs from current political usage and trivializes the welfare debate. They will point out that the current subject of political debate is the variety and extent of relief for the poor—"poor support" in the form of redistributive state entitlements—not whether the political community should provide for (any of) the needs of its members.[14] My answer to this objection is simply that influential and powerful figures in the current political debate—chiefly the United States Supreme Court—in fact do deny that the American Constitution obligates any of our governments to serve any of the substantive needs of their people. Some conservatives deny any and all affirmative constitutional duties precisely because, as we shall see later in this chapter and in chapter 2, they now see that granting the existence of even a minimal positive duty, like police pro-

[14] See Moon, *Responsibility, Rights, and Welfare*, 2; *cf.*, Barry, *Welfare*, 5, 33, 38.

tection against private violence, makes it harder to deny that the state is obligated to help the poor. Because these conservatives implicitly put police protection and poor support in the same boat, they implicitly sanction a capacious sense of the term "welfare."

The Supreme Court confirmed its antiwelfarist position in *DeShaney v. Winnebago County Department of Social Services* (1989).[15] In 1984 one Randy DeShaney beat his four-year-old son, Joshua, into a permanently retarded state. Because the Department of Social Services had previously been informed at least four times of DeShaney's past acts of violence against Joshua, three times by physicians attending the child in local hospitals, and because the department's caseworkers had been monitoring Joshua's case for over two years, Joshua's mother, divorced from DeShaney, brought a federal suit in Joshua's behalf against the department and some of its employees. She claimed that the department had failed to protect Joshua from what it should have known was a violent parent and that this failure denied Joshua's right to physical security under the Fourteenth Amendment. The Court dismissed the action by a vote of six to three. Chief Justice William Rehnquist wrote for the Court that since Joshua was not in the physical custody of the state at the time of his injuries, the Constitution imposed no obligation on the state to protect him from third-party violence. Citing cases denying rights to abortion funding and adequate housing, Rehnquist held that the framers "were content to leave the extent of [substantive] governmental obligation . . . to the democratic process." To this he added with approval the following statement from another case: "As a general matter, a state is under no duty to provide substantive services for those within its border."[16]

The Rehnquist Court itself has thus implicitly put governmental provision of physical security, adequate housing, and medical treatment in the same category. And by so doing it has licensed a strategy of defending poor support that begins with proving what should be an uncontroversial proposition: that the constitutional state is obligated to provide the minimal substantive benefit of the nightwatchman state,

[15] 489 U.S. 189 (1989).

[16] 489 U.S. 196, quoting from *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982), and citing, inter alia, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (state not constitutionally obligated to provide adequate housing) and *Harris v. McRae* 448 U.S. 297, 317–18 (1980) (Congress not constitutionally obligated to fund abortion or other medical services). Technically, *Lindsey* dealt with the due process clause of the Fourteenth Amendment and *Harris* with the due process clause of the Fifth Amendment. But these clauses served as vehicles for characterizing the Constitution as a whole, conflating it with the judicially cognizable constitution. Thus, at 489 U.S. 196, Rehnquist treated the proposition from *Youngberg* as a general principle of constitutional law.

namely, bodily security of the kind arguably denied Joshua DeShaney. I offer proof of this obligation in chapter 2 of this book as part of a larger contention that the American Constitution makes sense as a charter *primarily* of benefits, and that the Constitution makes no sense as the charter of negative liberties depicted in *DeShaney* and companion cases.

Though I regard the chief justice's argument for the Court's action in *DeShaney* (the *argument*, not necessarily the decision, as we shall see) a constitutional and strategic mistake, I fully accept the Court's implicitly capacious sense of governmental benefits or welfare, and I could cite *DeShaney* as legal authority for the usage I propose. Justification for a broad sense of "welfare" lies also in the fact that there is no clear separation of redistributive policies from either regulatory policies or forbearances from regulation for the sake of "negative rights." Barry himself concedes as much, albeit with no effect on his restricted sense of "welfare." He relates the "obvious point" that "redistribution" is involved in the state's protection for negative rights, like the "right to life" protected by laws against murder (his example) and the institutions that enforce these laws. Enacting and enforcing these laws involves redistribution because it "involve[s] positive action by the state in the provision of courts, police and so on." To this Barry adds a point that Americans can well appreciate in the new age of "homeland security": that the law-and-order or nightwatchman state, "although limited, could still be very large," requiring "virtually unlimited expenditure."[17] Later he says that provision for the poor can be justified as "logically equivalent to the demand for [national] defence, law and order and all the other familiar activities by the state," and that "to this extent traditional [free-market] liberalism is as much a welfarist doctrine as any other political ideology" (119).

Barry thus suggests that all acts of government are either immediately redistributive or protective of prior redistributive acts. An extensive case for this proposition is set forth by Stephen Holmes and Cass Sunstein in a recent book that draws out implications of the fact that the protection of so-called negative rights depends on governments that are "to extract and reallocate" money and other resources from those who have to those who have not.[18] Holmes and Sunstein invite

[17] Barry, *Welfare*, 79.

[18] Holmes and Sunstein, *The Cost of Rights*, 29–39; see also 62–64, 114–17, 129, 131, 165, 184–88, 216, 230. For some of the earlier versions of this point, see Graber, "Clintonification of American Law," 760–62. See also Bandes, "The Negative Constitution," 2282–85, 2323–25. At one point Barry classifies welfare policies as either redistributive or actuarial (forms of social insurance). Though he wants to claim that the latter is largely consistent with free-market ideology (see 92, 101, 104–5), he eventually observes that "in almost all cases the

persons who think they oppose poor support as a matter of principle to "contemplate the obvious": that the definition and protection of property is a "government service" to the propertied funded from "general revenues extracted from the public at large" (29). They add that like all government services, this one is justified only to the extent that it contributes to "collective purposes," in this case the "nation's real estate and capital stock" (116–17).

To critics who might contend that unlike the poor, the propertied create the wealth that funds their own support, Holmes and Sunstein point to the dependence of property and the market on such state functions as national defense and on the contributions of "low-income youth" whom the state conscripts in times of war (62–63). Critics of Holmes and Sunstein may respond that conscription should not count as redistribution because victory in war is a public good from which all Americans benefit equally, even though some Americans might regard some wars as immoral and even illegal. But a similar argument can justify state provision for the poor. If all Americans arguably could have benefited from an American military victory, say, in Vietnam, notwithstanding the many Americans who opposed that war and the number who even urged and ultimately applauded victory by the other side, why could not all Americans have benefited from the successes of tax-supported campaigns against poverty? If conscription for foreign wars does not count as some pejorative form of redistribution, why view taxation for the War on Poverty as a pejorative form of redistribution? And if both forms of war are redistributive and wrong solely because redistributive, we have graduated to a general moral philosophy that condemns all coercive government, including democratic governments that redistribute resources to protect so-called negative liberties. I need not ask how one could justify such a theory. (Or how one could even state such a theory: Can property be so individualized and the right thereto so strong as to condemn the redistribution needed to define and enforce laws against theft—i.e., theft of property?) It is enough for me to note that exercises in normative constitutional theory must assume the possible legitimacy of constitutional government and therewith—since constitutional government, is still *government*, and since government is necessarily redistributive—the difficulty of condemning redistribution per se.

As a term of everyday political discourse, "welfare" does refer to state provision for the poor, the elderly, and the disabled. But "welfare" is hardly limited to such references even in ordinary political dis-

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insurance element quickly becomes a fiction and the services become, to all intents and purposes, tax financed," the benefits "of *redistributive* taxation" (115, his emphasis).

course. A broader use is evident in such familiar expressions as "corporate welfare," "middle-class entitlements," and, more interestingly, "the general welfare."[19] Barry himself cites social-scientific findings and a "'theorem' of political economy known as 'Director's Law'" in observing the tendency of all Western democracies to redistribute toward middle-income groups more than to the poor, a pattern reversible, he says, only by a "most unlikely alliance between rich and poor."[20] Regarding "the general welfare," general readers are likely to find no profound substantive conflict among Madison's statements that "Justice is the end of government" (51:352) and that "the public good, the real welfare of the great body of the people is the supreme object to be pursued; and that no form of government whatever, has any other value, than as it may be fitted for the attainment of this object" (45:309). There is no evidence that this juxtaposition of statements would have been unintelligible to Madison or to his audience, and it may owe its intelligibility to us by virtue of what Barry calls the "promiscuity of welfare" as "a concept which attaches itself indiscriminately to other moral and political ideas," especially justice.[21]

Barry treats the "promiscuity of welfare" as a cause of error and "confusion in political argument," chiefly with regard to the rank ordering of political ends. Attaching welfare to justice and other ends evidently gives welfare a preeminence that Barry wants to deny. He would "disentangle" welfare from justice, rights, and social order, first

[19] Listing such benefits risks being construed as a concession to the false distinction between redistributive and nonredistributive policies. Nevertheless, I refer the reader to a biting exposé of what the authors call government "wealthfare," or "the money we hand out to corporations and wealthy individuals," some $488 billion a year as of 1996; see Mark Zepezaur and Arthur Naiman, *Take the Rich Off Welfare* (Tucson, Ariz.: Odonian Press, 1996).

[20] Barry, *Welfare*, 106–7.

[21] Ibid., 6. In three contiguous sentences of *Federalist* No. 45 (309), Publius conflates "the public good," "the real welfare of the great body of the people," and "the public happiness." At the risk of illustrating Barry's point about the "promiscuity of welfare," I follow Publius's lead in this book. Though I appreciate ways in which people can be well-off without being happy, lack of analytic refinement in this particular is of no consequence in the present debate. In chapter 2 I show that the Constitution is a scheme for reconciling public opinion to the public's true well-being. Constitutional government at its ideal best must therefore bring public opinion as far as it can be brought toward the public's true well-being. Or, in the alternative, constitutional government should pursue the closest approximation of the general welfare that the public can approve. In either case constitutional government will strive for an overlap between some approximation of the general welfare as an objective good and the public's subjective well-being. And there is a sense of happiness (a sober, reflective happiness) that makes happiness and subjective well-being working surrogates of each other. This excuses Publius's conflation of the public happiness and the public welfare.

asserting that welfare "intuitively has no greater claim to priority" and eventually suggesting it be ranked lower than the rest. He complains that a conception of welfare broad enough to link welfare with justice effectively undermines the distinction between (welfare as) *redistributive entitlements* and (justice as) *the negative virtue of not hurting others* in possessions they have lawfully acquired. And, he adds, where welfare and rights are connected, (rights as) "claims to forbearance from invasive actions by others" excuse (welfare as) "entitlements to well-being from the state" (5–6).

I have supplied parentheticals in the last two sentences to show that Barry's complaint about a broad sense of "welfare" is little more than a complaint; as an argument it is a poor one because it begs the question. Even if valid in the welfare context (we have seen otherwise), a distinction between helping people through redistributive entitlements and trying to prevent people from hurting each other, cannot by itself argue for limiting either "welfare" to "redistributive entitlements" or "justice" to "not hurting others." The same holds for Barry's distinction between claims to "forbearance" from invasive harms and claims to "entitlements." That distinction, by itself, falls short of justifying any given use of the term "rights." If confusion of distinct things is all we would avoid, why not reserve "rights" for "redistributive entitlements"? And if the answer is that people generally attach value to "rights" that we do not want attached to "entitlements, " it can only be because there is something wrong with entitlements, which has to be shown. Whether "welfare" should be conceived exclusively as redistributive entitlements; whether justice can be conceived solely as a negative virtue; whether the state does much of anything, if anything at all, that does not require redistribution of resources; whether rights can be conceived (much less honored in practice) apart from redistributive practices—all these positions must be argued for.

Barry offers what he thinks are reasons for disconnecting welfare from justice and rights. He proposes two such reasons: first, that "disentangling . . . welfare from other values" serves to clarify political language "so that value disagreements can be more easily identified," and second—explicitly his main concern—that "the assimilation of other values to the welfare ideal imposes upon a society an agreement about values, an hierarchy of ends and purposes, which is unlikely to exist." Barry bases this second claim partly on the controversies regarding the meaning of "'well-being' . . . and other familiar expressions of welfare philosophy." He is confident that these "intractable disputes" will lead to "little or no convergence" of opinion, even among those who agree that "welfare should be the goal of public policy" (6–7).

The first of these reasons (clarity of language) makes for effective argument only where inquiry seeks to disassociate kinds of things whose association is admitted by all sides to be a mistake. Where there is no such admission, the argument assumes what has to be shown. Chapter 2 of this book contends that the state's provision of resources for ends like justice and order is itself a contribution to the general welfare that the state is constitutionally obligated to make. The chapter contends further that the duty to provide for justice, order, and the security of persons and property through police protection, courts of civil and criminal justice, and other means argues for duties to combat or relieve poverty and disability. This book thus argues for the broad, connected view of welfare and welfare provision that Barry opposes. What he and others might count as a purification of political discourse I would therefore count as a distortion of political reality, and I shall try to defend my account.

As for Barry's principal suggestion regarding usage, it is not evident why a broad, connected view of welfare and welfare provision should either impose values on society or encourage the imposition of values on society. It is hard to see what is especially impositional about usage that recognizes the redistributive nature of, say, the civil enforcement of contracts. Who is imposed upon by references to "corporate welfare," a term whose use acknowledges the fact of direct and indirect corporate subsidies? I presume here that Barry would probably agree that values can fairly be said to be imposed on society only when stable majorities of citizens have no realistic hope of lawfully changing particular governmental policies and procedures. The question would then be why Barry assumes that a broad, connected view of welfare should invite undemocratic imposition more so than a restricted view of welfare, which, under some circumstances, a stable majority might also oppose to no avail because of the strategic advantages of a well-situated minority. The current lack of a prescription drug benefit under Medicare can thus be seen as an imposition on the majority of the population whose taxes help pay for the legal, physical, and social preconditions of the pharmaceutical industry that, so far, has successfully opposed the proposed entitlement. Even if corporate welfare and poor relief combined were somehow more impositional than corporate welfare without poor relief (the latter affecting a minority that is poor, the former a majority composed of the poor and the stockholding middle and upper classes), where is the imposition in merely labeling corporate subsidies and poor relief what they seem to be: varieties of state provision or "welfare"?

Though Barry omits explanation, part of the answer to this last question may lie, ironically, in the most likely justification *for* a broad view

of welfare. Chapter 2 of this book borrows from writers like Holmes and Sunstein to argue that the provision of, say, police and courts should count as provisions for the general welfare and that granting that government has these obligations leaves no principled way to deny at least some governmental help for the poor.[22] If this argument proves to be sound, some help for the poor is morally and constitutionally imperative for all who agree that the state is constitutionally obligated to provide for police and courts. Implicit agreement with this proposition is one way to explain Rehnquist's denial of Wisconsin's obligation to protect Joshua DeShaney from predictable violence. For those who cannot deny this obligation—an undeniable obligation, argues chapter 2—our hypothesis puts the force of constitutional principle behind state provision for the poor; it removes active concern for the poor from the sphere of discretionary political choice. Chief Justice Charles Evans Hughes affirmed this imperative of a decent society in his celebrated approval of a Depression era minimum-wage law: "What . . . workers lose in wages" from "unconscionable employers," said Hughes, "the taxpayers are called upon to pay. The bare cost of living must be met."[23]

If imposition lurks in such an argument, it lies in the imperatives of moral and, I shall argue, constitutional principle. As construed here and in recent works by most constitutional theorists presently defending a constitutional duty of welfare provision, this duty authorizes no unconditional *judicial* impositions on unwilling politicians and taxpayers.[24] (Hughes and the Court upheld a minimum wage enacted by a state legislature; they did not impose the minimum wage by judicial decree.) Even if judicially unenforceable, the duty in question would justify exhortation and criticism of the electorate and its representatives in the Constitution's name, exhortation and criticism perhaps by judges (depending on a relaxation of the judge-made rule against "advisory opinions") and certainly by others. The others include constitutional theorists; they would be concerned with constitutional ends as they now are with institutions and negative liberties.

Our question thus becomes whether an imperative of constitutional principle counts as an (illegitimate) imposition on democracy. Another

[22] See Holmes, *Passions and Constraint*, 245–46.

[23] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

[24] See Sager, "Justice in Plain Clothes," 420–25; Sunstein, *Partial Constitution*, 139, 145–49; Michelman, "Welfare Rights in a Constitutional Democracy," 684–85. For an exception, see Graber, "Clintonification of American Law," 753–62. See also Bandes, "The Negative Constitution," 2327–30. I qualify my reservations about judicial power in the concluding section of chapter 6, which discusses the special problem of constitutional failure.

way to put this question is whether democracy can be reconciled to constitutionalism or whether democracy can take constitutional form. I assume here that democracy can take constitutional form partly because I have defended the proposition elsewhere, partly because I think relatively few readers of this book expect the question reopened here, and partly because the argument here is offered as an exercise in the normative theory of constitutional democracy, an exercise that must assume the legitimacy and possibility of constitutional democracy. For these reasons an appeal to democracy *against* constitutionalism belongs to a different debate.[25] Barry's second argument is out of place in the present discussion. Barry's argument from the impositional character of welfare broadly conceived could be relevant here only if the imperatives of moral and constitutional principle constitute illegitimate impositions on popular majorities, for the imperative of moral-constitutional principle is the only imperative in the connected view of "welfare" that Barry opposes.

An exercise in first-order constitutional theory, this book is an inquiry whose findings are submitted to a more-or-less democratic readership that attaches normative weight to constitutional principles. Exercises of this sort must assume that constitutional imperatives are not illegitimately impositional. If a capacious view of "welfare" is wrong in the present context, the reason must be not that it imposes anything on anyone but that it does so illegitimately—that is, that it defeats some constitutional purpose or offends some constitutional principle. It could be, for example, that usage which lumps poor support with police protection undermines the general welfare by trying to put a form of unproductive state provision in legitimate company. Such an argument would turn on the proposition that redistributive state provision for the poor (or whomever) actually harms everyone, including its recipients. This is a familiar contention against poor support, and I can safely assume here that it is at least partly or even largely correct. My present concern is not the soundness of this particular case against poor support but its general argumentative character. The proposition that poor support actually hurts the poor hardly implies that government has no obligation to facilitate their welfare; it may in fact function as the premise of what is formally a welfarist argument.

Charles Murray makes such a welfarist argument. He says the nation should abandon "the state social insurance and welfare apparatus" of the modern state, including "every middle-class entitlement,

[25] For my contribution to this debate, see Sotirios A. Barber, *The Constitution of Judicial Power* (Baltimore: Johns Hopkins University Press, 1993), esp. chaps. 2, 7.

agricultural subsidy, and corporate subsidy along with programs for the poor."[26] These schemes, he says, foster irresponsibility among their supposed beneficiaries by trying to insulate them from the painful consequences that naturally follow upon their conduct. The result? "The babies of the poor languish. Poor people . . . huddle in cardboard boxes beneath overpasses. The rich install ever more sophisticated security systems around their estates" (130–34). Murray's cure? Abolish most transfer programs and limit the state largely to preventing private violence, providing for the limited number of public purposes that include national defense and an educated population (private education funded through state vouchers), *and* "enabling people to enter into enforceable voluntary agreements" (7–10, 12, 95–97). This last function of course secures "the right of contract and the edifice of law" that constitute the modern market, and it is freedom to function responsibly in this market that will eventually secure "the happiness of all the people" (9, 130). This argument is a welfarist argument. It assumes that the constitutional state is obligated to do what it reasonably can to facilitate the people's well-being.

Yet one final argument can be made for Barry's view that imposition lurks in welfare broadly conceived: For those who hold that the Constitution demands some state provision for the poor, it becomes all but impossible to avoid at least *some* judicial impositions, or the appearance thereof, on popular majorities who might disagree with judicial readings of the Constitution. Even if it is left to popular legislatures to decide initially what benefits go immediately to whom and at whose immediate expense, affirmative legislative decisions could create openings for judicial action under the judicially enforceable principle that the state should provide equal protection of the laws. Thus, everyone understands that courts could act against a state's policy of extending police protection only to white Protestant heterosexuals, for the defect of such a policy would be its discriminatory character, not its failure to provide a benefit. Conceive police protection as just another form of redistributive welfare and it is not inconceivable that some judges might reason from police protection to "welfare rights." The argument would be that having initially decided to take liberty and other resources from some persons (the strong and bold) to benefit others (the weak and timid) who disproportionately need police protection, the principle of equal protection requires that the legislature take from

[26] Charles Murray, *What It Means to Be a Libertarian* (New York: Broadway Books, 1997), 130.

some (the rich) to meet the disproportionate need of others (the poor) for education, housing, and medical care.[27]

Though this last argument would be a startling departure from current judicial doctrine, it could conceivably take hold at some future point. Add further premises to this prospect, and you could challenge my claims that constitutional democrats as such cannot view constitutional principles as illegitimately impositional and that constitutionalizing welfare need not mean more power for unelected judges. If constitutional meaning were in the eye of the beholder (something I have denied elsewhere)[28], if judicial findings of "welfare rights" went against popular conceptions of constitutional meaning, and if elected institutions were staffed and organized as fairly to represent the public's preferences better than the courts, then Barry might be right: relatively undemocratic imposition might lurk in a broad sense of the term "welfare." But a crucial element of this challenge is the premise that constitutional meaning is in the eye of the beholder; this premise expresses a moral metaphysics that finds the meaning of normative terms like "the general welfare" and "equal protection" in some subjective source. Barry is quite open about his moral subjectivism, as we have seen. The principal weakness of this stance is that it can say nothing about the philosophic status of "welfare" and "equal protection" that would not apply also to ideas like "liberty" and "democracy," and yet it assumes both the real existence and the approximate knowability of liberty and democracy while denying the same of welfare and equal protection. When Barry says the meaning of welfare is subjective and that a broad sense of "welfare" invites imposition, he assumes there is something objectively wrong with imposition, which in turn assumes the possibility of objective truth about the moral status and meaning of liberty and democracy. He apparently does not believe, therefore, that the status and meaning of *all* moral ideas are incorrigibly subjective. And the question is, what is so specially defective about either "welfare" or "equal protection," the likely vehicle for welfare's judicial imposition? I say more about issues of this sort in chapter 4.

[27] For a partial survey of writers who adopt strategies of this kind, see Graber, "Clintonification of American Law," 753–56.

[28] Barber, *Constitution of Judicial Power*, 45–48, 203–8.